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No. 01-1054

IN THE

Supreme Court of the United States

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, *et al.*,

Petitioners,

v.

LABOR/COMMUNITY STRATEGY CENTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion Of *Amici Curiae* Foothill Transit, Antelope Valley Transit Authority, Montebello Bus Lines, City of Azusa, City of Baldwin Park, City of Claremont, City of Diamond Bar, City of Lancaster, City of Monrovia, City of Montebello, City of San Dimas, City of Santa Monica, and City of Walnut For Leave To File Brief *Amici Curiae* In Support Of Petition For A Writ Of Certiorari And Brief *Amici Curiae*

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MOTION FOR LEAVE TO FILE

Foothill Transit, Antelope Valley Transit Authority, Montebello Bus Lines, and the Cities of Azusa, Baldwin Park, Claremont, Diamond Bar, Lancaster, Monrovia, Montebello, San Dimas, Santa Monica and Walnut ("*amici*") hereby move, pursuant to S. Ct. R. 37.2, for leave to file a brief of *amici curiae* in support of the Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit. *Amici* are filing this motion because, although Petitioners and Respondents consented to the filing of an *amicus curiae* brief by Foothill Transit, the additional *amici* sought to join the proposed brief after that consent was given. At that time, it was too late to obtain new consents from the parties. A copy of the proposed brief is attached.

As more fully explained at pages 1-3 of the attached brief under "Statement of Interest of *Amici Curiae*," *amici* are operators of scheduled bus services and cities within greater Los Angeles County. All may suffer funding losses and significant disruption in their transportation services should the district court's order remain in effect.

This brief will assist the Court in determining whether to grant *certiorari* because *amici* are uniquely suited to explain the far-reaching implications of the district court's order and the Ninth Circuit's opinion, which override important principles of federalism. Particularly, *amici* have a special perspective from which to address: (1) the need for this Court to grant *certiorari* to protect state choice whether to participate in cooperative federalism programs which provide the federal funding that is the lifeblood of numerous state and local operations; and (2) the almost unlimited power that the Ninth Circuit decision gives district courts to exercise remedial powers against state and local agencies that enter into voluntary consent decrees without admitting to or being found in violation of federal law.

Accordingly, a*mici* respectfully request that the Court grant leave to file the attached brief *amici curiae*.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of Interest of the *Amici*	1
Introduction	3
Argument	6
I. Though *South Dakota v. Dole* Requires That States Retain The Choice To Participate In Cooperative Federalism Programs, The Ninth Circuit Authorizes District Courts To Strip States Of That Choice	6
II. In Ruling That A Party To A Consent Decree Waives All Meaningful Federalism Objections To A District Court's Remedial Authority, The Ninth Circuit Flouts This Court's Precedents, Violates Basic Notions Of Judicial Restraint, And Discourages The Settlement Of Litigation	12
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Fullilove v. Klutznick, 448 U.S. 448 (1980) 6

Local Number 93, International Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986) 16

Milliken v. Bradley, 433 U.S. 267 (1977) 12, 15, 16

Missouri v. Jenkins, 495 U.S. 33 (1990) .. 12, 14, 15, 16

New York v. United States, 505 U.S. 144 (1992) 6, 9, 10, 11

O'Brien v. Massachusetts Bay Transportation Authority, 162 F.3d 40 (1st Cir. 1998) 10, 11

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) 6

Rizzo v. Goode, 423 U.S. 362 (1976) 4

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 15

South Dakota v. Dole, 483 U.S. 203 (1987) ...6, 7, 8, 11

Spallone v. United States, 493 U.S. 265 (1990) ... 3

Stefanelli v. Minard, 342 U.S. 117 (1951) 4

Cited Authorities

	Page
Turner v. Safley, 482 U.S. 78 (1987)	4
United States v. Armour & Co., 402 U.S. 673 (1971)	16
United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988)	14
United States v. ITT Continental Baking Co., 420 U.S. 223 (1975)	16
Whitcomb v. Chavis, 403 U.S. 124 (1971)	15
Statutes:	
Cal. Pub. Util. Code § 130305	9
49 U.S.C. § 1602	9
49 U.S.C. § 5309	9

STATEMENT OF INTEREST OF THE *AMICI*

Amici Foothill Transit, Antelope Valley Transit Authority, Big Blue Bus, Montebello Bus Lines, and the Cities of Azusa, Baldwin Park, Claremont, Diamond Bar, Lancaster, Monrovia, Montebello, San Dimas, Santa Monica and Walnut (*"amici"*) are not parties to the consent decree at issue in this case.[1] Nor are any of the thousands of bus riders who use their services each weekday. Yet the Ninth Circuit's decision affirming the order of the district court in this case may significantly affect the *amici*'s and other transportation services, and the riders who depend on these services.[2]

Foothill Transit, Antelope Valley Transit Authority, Montebello Bus Lines, and the cities of Claremont and Santa Monica (the "bus operator *amici*") operate scheduled bus services. These *amici* coordinate their bus service operations with the overlapping services provided by Petitioner, the Los Angeles County Metropolitan Transportation Authority ("MTA").

The municipalities of Azusa, Baldwin Park, Claremont Diamond Bar, Lancaster, Monrovia, Montebello, San Dimas, Santa Monica and Walnut (the "city *amici*") are cities within greater Los Angeles County that provide various forms of van and bus transit services and transit-related infrastructure projects to their citizens. These *amici* also coordinate their transit operations with MTA as part of a cooperative effort to provide an integrated transportation network for all of Los Angeles County.

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1. This brief was authored entirely by counsel for *amici*, and *amici* have borne all costs associated with this brief. No party or other person or entity made a monetary contribution to the preparation or submission of the brief.

2. None of the *amici* operate rail services.

Because of the manner by which MTA allocates money to the *amici*, a substantial drain on MTA's funding undoubtedly will drain funding from the *amici*. Tens of millions of dollars of funding for the *amici*'s transportation services — the regularly scheduled bus services run by the bus operator *amici* and the van and bus-transit services run by the city *amici* — come from Los Angeles County Propositions A and C. Each of these Propositions instituted a one-half cent sales tax in Los Angeles County earmarked for public transportation. As part of its authority, MTA controls a substantial pool of these funds and disperses them to the *amici*.

The Ninth Circuit ruling challenged here affirms a remedial order that will cost MTA many millions of dollars to implement. If MTA attempts to take Proposition A and C funds it otherwise would distribute to the *amici* to satisfy MTA's court-ordered obligations, less funding would be available to the *amici*.[3] This development would be disastrous to the *amici* and to the residents who depend on *amici*'s transportation services.

Not only will the *amici* potentially lose essential funding, but the district court's order jeopardizes the cooperative relationship between the *amici* and MTA which jointly provide an interconnected bus network for residents who travel beyond or near the boundaries of MTA's service area. Complex transportation services like the ones the *amici* provide do not operate in vacuums. Overlapping bus services,

3. According to the Special Master, "the Consent Decree requires that the MTA "reprogram funds, which may include, but not be limited to, revenues from Proposition A and C discretionary funds" if it fails to meet its targets. App D, at 51. Thus, there is a very real prospect that MTA will use for its own needs funding upon which the *amici* depend.

and even localized services such as shuttles and city-operated vans that transport the disabled, depend on coordination between the *amici* and MTA. Together, they forge an interrelated transportation system for citizens in Los Angeles County and outlying regions. The district court order threatens to derail these services. Without considering the possible effects on the *amici*, the district court proposed that the Special Master "consider the movement of buses from less crowded lines, and the possibility of reducing or eliminating MTA service to those municipalities served by the sixteen municipal bus lines that offer overlapping service to the service provided by the MTA." App. C, at 48. Were the Special Master to reduce or eliminate MTA bus services as suggested, the burden would fall on the *amici*, who would be forced to provide replacement or supplemental services to the displaced riders, without receiving additional funding with which to pay for such services.

INTRODUCTION

This is a case about federalism. Specifically, it is a case about the federalism-based limits on the remedial powers of a federal court to enforce a voluntary consent decree.[4]

This Court's precedents make crystal clear that federalism principles require that federal courts "exercise the least possible power adequate to the end proposed" when issuing remedial orders that substantially affect state and local decision-making. *Spallone v. United States*, 493 U.S. 265, 280 (1990) (internal quotations omitted). Courts "must be

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4. By "voluntary," we mean a consent decree where the signing party has neither admitted a violation of law nor has been adjudicated to have violated a law.

constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951)). Particularly when dealing with state agencies empowered to administer complex state and municipal institutions, federal courts should hesitate before substituting their judgments for those of the agencies. *E.g., Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (recognizing that operating state prison is "peculiarly within the province of the legislative and executive branches of government").

The Ninth Circuit has run roughshod over this Court's federalism jurisprudence. Simply put, its decision here instructs district courts that federalism places *no* meaningful restraints on the exercise of their remedial power for violations of consent decrees, and even authorizes these courts to order a state agency to sacrifice its participation in cooperative federalism programs.[5]

More specifically, the Ninth Circuit's opinion announces two principles of law that cannot be squared with this Court's jurisprudence. First, although this Court has held that federal law must preserve a state's freedom of choice about participating in a cooperative federalism program, the Ninth Circuit holds that a district court, in fashioning a consent decree remedy, may strip a state agency of its choice to participate in such a program.

5. At the outset, it should be noted that the violation of the consent decree at issue is not a violation of the law. Rather, it is an alleged violation of the express terms of the consent decree, which provided that MTA would meet specified load factor targets on MTA's buses. App. A, at 3-11. At most, this is a violation of contract, and even that technical language was subject to different interpretations. App. A, at 7, n.2.

Second, the Ninth Circuit incorrectly holds that a local agency settling litigation through a consent decree (even when it does so on its own initiative without any adjudication or admission of wrongdoing) thereby waives all federalism-based objections to whatever remedies a district court might devise for violations of that decree. This ruling simply cannot be squared with this Court's decisions declaring that federal courts, when considering remedies against state agencies for actual violations of federal law, must consider the federalism interest of those agencies. Under the Ninth Circuit's illogical approach, state agencies that have violated no law enjoy less protection from federalism principles than agencies found to have violated the law.

The Ninth Circuit's rulings on cooperative federalism and consent decree waiver have drastic implications. By authorizing federal courts to order state agencies to forgo the federal funding they receive from cooperative federalism programs, the Ninth Circuit has put in jeopardy the lifeblood of hundreds of local and state agencies nationwide. And by instructing state and local agencies that they will automatically waive their federalism-based rights whenever they sign a consent decree, the Ninth Circuit has created a powerful disincentive for entering into consent decrees, and, thus, put in jeopardy the most important and effective means for settling civil rights and other institutional litigation.

In order to conform the law of the Ninth Circuit with this Court's rulings, and to avoid the serious and widespread practical consequences of the Ninth Circuit's decision, we urge this Court to grant the Petition for Certiorari.

ARGUMENT

I. THOUGH *SOUTH DAKOTA v. DOLE* REQUIRES THAT STATES RETAIN THE CHOICE TO PARTICIPATE IN COOPERATIVE FEDERALISM PROGRAMS, THE NINTH CIRCUIT AUTHORIZES DISTRICT COURTS TO STRIP STATES OF THAT CHOICE

In *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), this Court held that federal financial incentives designed to influence state policy choices may comport with principles of cooperative federalism because they "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* at 17. More recently, in *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), the Court applied *Pennhurst* in recognizing that choice is essential to programs by which Congress employs its spending "power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *Dole*, 483 U.S. at 206 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)). For such cooperative federalism programs to remain constitutional, however, it is critical that "the residents of the State retain the ultimate decision as to whether or not the State will comply" with federal funding mandates. *New York v. United States*, 505 U.S. 144, 167-69 (1992).

The Ninth Circuit, in its cavalier treatment of federalism concerns, turns these precedents upside-down. While this Court's decisions make a state's freedom of choice the *sine qua non* of cooperative federalism programs, the Ninth Circuit holds that, precisely because a state has that freedom

of choice, a district court may strip it of that choice. According to this convoluted reasoning, losing the chance to participate in cooperative federalism programs does not implicate any federalism principle unless the district court's order requires a local agency to violate federal law; failing to satisfy funding requirements, in the Ninth Circuit's opinion, is not such a violation. Thus, in rejecting MTA's claim that the district court overstepped its authority in fashioning a remedy that jeopardizes MTA's participation in cooperative federalism, the Ninth Circuit blithely declared:

> [T]he federal and state laws to which MTA refers are simply funding provisions with which MTA *may* choose to comply. The reward for compliance is state and federal funding. However, failure to follow the requirements of the funding mandates is not a violation of law. At most, [the district court's order] might disqualify MTA from entitlement to receive funds. . . . *See South Dakota v. Dole*, 483 U.S. 203 (1987) (emphasis added).

App. A, at 19-20.

As Judge Cynthia Holcomb Hall recognizes in her dissent, the majority's endorsement of a district court's unilateral power to abrogate a state's participation in such programs conflicts with the principles underlying cooperative federalism and flies in the face of this Court's jurisprudence:

> The consensual nature of these schemes is precisely the reason why their constitutionality is not open to question. *See generally South Dakota v. Dole*, 483 U.S. 203 (1987). Here, however, the remedial order took that choice out of MTA's

> hands and in effect required MTA to take a certain position regarding federal policy. Where the state or local government unambiguously agrees to forego federal funds in the consent decree itself, fewer federalism concerns arise; when the state or local government agrees to the terms of the consent decree, it makes a choice to not participate in the federal program. But where a federal court's remedial order prevents participation in the funding scheme, the state or local government is denied its choice. In taking away that choice, the district court effectively shifts power from the state to a single branch of the federal government.

App B., at 40.

Judge Hall's logic is impeccable. Without apparent irony, the Ninth Circuit has now authorized district courts to do exactly what *Dole* and other cases forbid Congress to do — namely, to strip a state of the choice whether to participate in cooperative federalism programs.

The Ninth Circuit's logic, by contrast, makes no sense whatsoever. The challenge MTA presented to that Court was whether a district court could impose a remedy that forced a local agency to forego federal funding provided through a cooperative federalism program. The Ninth Circuit's answer — that under *Dole* the district court did not require MTA to violate federal law — is no answer at all. The power of a federal court to order a state agency to violate federal law is not the question here; the question is whether a federal court may exercise its remedial powers to deprive a local agency of the freedom of choice guaranteed by this Court's federalism jurisprudence. And by focusing on the wrong

issue, the Ninth Circuit has left the federalism interests of states and local entities unrecognized and unprotected.

Importantly, the Ninth Circuit's flouting of local authority is likely to have widespread practical consequences for the operation of state and local agencies such as MTA. Through funding mandates, Congress holds out a carrot to state governments. By agreeing to comply with conditions these federal laws impose, states may receive vitally important federal funding through a system that is "replicated in numerous federal statutory schemes." *New York v. United States*, 505 U.S. at 167 (citing the Clean Water Act, the Occupational Safety and Health Act, the Resource Conservation and Recovery Act of 1976, and the Alaskan National Interest Lands Conservation Act as examples). Hundreds of millions of dollars are provided to the states under these statutory schemes, and they form a substantial portion of the budgets of state agencies including, as here, local transportation authorities.[6] Recognizing the critical importance of federal funding, the California state legislature has ordered local transportation entities to "take all action necessary to obtain the maximum amount of funding available" in the form of discretionary grants from the United States Department of Transportation. Cal. Pub. Util. Code § 130305.[7]

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6. For instance, for fiscal year 2002, federal grants will make up approximately $441 million of the MTA's budget. By comparison, projected revenue from fares amounts to only $243 million of the MTA's 2002 budget.

7. Section 130305 of the California Public Utilities Code states that the Public Utilities Commission shall take all action necessary to obtain funds pursuant to 49 U.S.C. § 1602. The provisions of section 1602 has since been incorporated into 49 U.S.C. § 5309.

In short, the Ninth Circuit's decision potentially allows a federal district court to wreak havoc with any local agency that enters into a consent decree. And that raises another fundamental issue of federalism repeatedly emphasized in this Court's rulings. As Judge Hall recognizes, "taking the decision . . . out of MTA's hands . . . raise[s] troubling political accountability concerns." App. B, at 40-41.

These concerns flow directly from this Court's decision in *New York v. United States*, which explained that, by giving states the choice of complying with federal funding mandates, "state governments remain responsive to the local electorate's preferences." *New York v. United States*, 505 U.S. at 168. In other words, if the citizens do not like the choice, they may elect officials who will better represent the citizens' interests. *Id.* If, however, the federal government strips the state of that choice, "the accountability of both state and federal officials is diminished." *Id.* When Congress supplants the authority of state agencies:

> [I]t may be state officials who will bear the brunt of public disapproval, while the federal officials . . . remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.

Id. at 169. By the same logic, when a federal court strips a state of choice, accountability also is diminished. *Cf. O'Brien v. Massachusetts Bay Transportation Authority*, 162 F.3d 40, 44 (1st Cir. 1998) ("it is difficult to fathom . . . how forcing a state agency to forego billions of dollars in federal subsidies

would render its hierarchs more accountable to the citizenry").[8] That is precisely what happened here.

By denying states their freedom of choice to participate in cooperative federalism programs, the Ninth Circuit has effectively sanctioned exactly the shift in political accountability this Court's decisions warn against. If the district court's order results in an overall decline in transportation service or a fare increase[9] or if it causes

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8. *O'Brien* is not directly in conflict with the Ninth Circuit, because, although it also involved federal funding, it was decided on the settled ground that federal courts have no power to enforce state constitutions. *Pennhurst*, 451 U.S. 1. In *O'Brien*, the First Circuit refused to enjoin a state agency from accepting federal transportation funds because the conditions to acceptance of those funds might conflict with the Massachusetts Declaration of Rights. What is instructive, however, is that the court recognized that depriving the state of federal funds would leave the state with unappetizing options for making up the shortfall such as raising taxes, laying off employees, and ceasing construction and improvements. *Id.* *O'Brien* said that a federal court should not place states in that position. "[I]f such dire remedies are to be implemented, that is a decision for Massachusetts to make, not for a federal court to impose." *Id.*

9. Ironically, as Judge Hall explains, the majority fails to consider that the loss of funding as a result of the remedial measures might threaten MTA's ability to comply with the remedial order. App. B, at 39-40. Consistent with the lip service it pays to cooperative federalism, the majority never considers where MTA is supposed to find the money to purchase and operate hundreds of new buses. As a practical matter, this is a significant consideration. Implicit in cases like *Dole* and *New York v. United States* is the notion that a state, when it exercises its choice to forego federal funding, can make up those funds through other means. *New York v. United States*, 505 U.S. at 168; *see also O'Brien*, 162 F.3d at 44 (discussing how state would have to find a way to make up for loss of transportation funds if ordered to forego federal funding).

problems outside the field of transportation, local officials will bear the brunt of their constituents' displeasure even though responsibility for these problems will properly lie with the district court. This basic unfairness that the Ninth Circuit has sanctioned is undemocratic and unconstitutional.

II. IN RULING THAT A PARTY TO A CONSENT DECREE WAIVES ALL MEANINGFUL FEDERALISM OBJECTIONS TO A DISTRICT COURT'S REMEDIAL AUTHORITY, THE NINTH CIRCUIT FLOUTS THIS COURT'S PRECEDENTS, VIOLATES BASIC NOTIONS OF JUDICIAL RESTRAINT, AND DISCOURAGES THE SETTLEMENT OF LITIGATION

In keeping with its total disregard of federalism concerns, the Ninth Circuit's decision contains a second and equally problematic holding. According to the Ninth Circuit, whenever a local agency signs a consent decree, even on a voluntary basis, it automatically waives its federalism objections to whatever remedial measures a district court might order for alleged violations of the decree.

The Ninth Circuit's holding cannot be reconciled with this Court's precedents. As this Court has made clear, even an agency that has violated the Constitution may still challenge an exercise of remedial power on federalism grounds. In *Milliken v. Bradley*, 433 U.S. 267 (1977), for example, this court held that a district court fashioning a remedial decree for an adjudicated violation of the equal protection clause "must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 280-81; *see also Missouri v. Jenkins*, 495 U.S. 33, 50-51 (1990). In short, federalism is one of the indispensable "equitable principles" that a district court must observe in exercising its remedial power. *Milliken*, 433 U.S. at 280.

Paradoxically, under the Ninth Circuit's holding, a party that voluntarily enters into a consent decree without admitting or being found to have violated any law enjoys less federalism-based protection than a party actually found in violation of federal law. According to the Ninth Circuit, the mere act of a state agency signing a consent decree in the spirit of compromise "relieves many federalism concerns." This is particularly true with respect to a district court's power to remedy violations of the terms of the consent decree. In this respect, once a state agency "consents to this form of dispute resolution," its federalism interest in managing its own affairs is completely satisfied so long as the district court, in exercising its remedial powers, permits the agency to submit a proposed remedy. App. A, at 19. In other words, the district court is relieved of all federalism constraints in fashioning a remedy if it permits a state agency to submit a proposal, which the court is free to reject — as it did here. In sum, under the Ninth Circuit's decision, by signing a consent decree, a state agency waives all substantive federalism objections to a district court's authority to fashion remedies for violations of that decree.

Here, the Ninth Circuit betrays a fundamental misunderstanding of waiver in the context of a consent decree. Naturally, when a party signs a consent decree, it waives objections to the actual terms of that agreement. But the act of signing a voluntary consent decree does not waive federalism-based objections to remedies not contained in the decree itself.[10]

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10. This is particularly relevant here, because the consent decree in this case nowhere requires MTA to purchase buses if it fails to meet a load factor target. *See generally* Petition for a Writ of Certiorari of Petitioner Los Angeles County Metropolitan Transportation Authority, at 3-5, 13-15. For this reason, any purported waiver is

(Cont'd)

To hold otherwise (as the Ninth Circuit has) is to confuse the actual terms of a decree with the lawful means by which a court may remedy alleged violations. As a result, despite the principles of judicial restraint that highlight this Court's federalism jurisprudence, the Ninth Circuit has sanctioned the exercise of virtually unlimited judicial power against state and local agencies when enforcing consent decrees.

Missouri v. Jenkins illustrates the error in the Ninth Circuit's approach. In *Jenkins*, after a lengthy trial a state and local school district were found to have operated a segregated school district. *Id.* at 37. To eliminate the vestiges of discrimination, the district court directly ordered a tax increase to finance a desegregation plan. *Id.* at 38-42. On appeal, this Court reversed this portion of the order because it "contravened the principles of comity that must govern the exercise of the District Court's equitable discretion." *Id.* at 50. Moreover, "although the 'remedial

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(Cont'd)

unlike the waiver applied in the *United States v. City of Yonkers*, 856 F.2d 444 (2d Cir. 1988), *rev'd sub nom on other grounds, Spallone v. United States*, 493 U.S. 265 (1990), a case upon which the Ninth Circuit relies. In *Yonkers*, the city entered into a consent decree that expressly and specifically mandated that it pass implementing legislation to build public housing. When it failed to comply, the district court held the city council in contempt until it passed that legislation. On appeal, the Second Circuit held that the city council could not assert federalism objections to the district court's order which simply "was carrying out the terms of the Consent Judgment." *Id.* at 454. "By its approval of the Consent Judgment, the City Council itself selected the remedy of implementing legislation and cannot complaint that the District Court approved the agreement." *Id.* This is very different than the current case where the district court approved a remedy selected by a special master that is not set forth in the express terms of the agreement.

powers of an equity court must be adequate to the task, . . . they are not unlimited,' . . . and one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions."[11] *Id.* at 51 (quoting *Whitcomb v. Chavis*, 403 U.S. 124 (1971)).

As noted above, *Jenkins* is not alone in applying federalism principles to a district court's choice of remedies after finding a federal law violation. Although in *Milliken*, this Court upheld a district court's remedial order in the context of an adjudicated constitutional violation, this Court emphasized the "inherent limitations[s] upon federal judicial authority" and demanded that they consider the state's federalism interests when imposing remedies. *Milliken*, 433 U.S. at 280-82; *see also Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 389 (1992) ("Federal courts may not order States or local governments, over their objections, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated.")

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11. In *Jenkins*, in a portion of the opinion supported by a five-to-four majority, this Court did hold that the district court would have the power to issue an order requiring a school district to raise taxes above state-imposed tax limits "where there is a reason based in the Constitution for not observing the statutory limitation." *Jenkins*, 495 U.S. at 52-58. In rejecting the majority's decision on this point, Justice Kennedy, in a concurrence, argued that the "casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary disregards fundamental precepts for the democratic control of public institutions." *Id.* at 58-59 (Kennedy, J., concurring). As Justice Kennedy explained, "federalism concerns" counseled "against the [majority's] analysis." *Id.* at 68 (Kennedy, J., concurring). Indeed, when "judicial discretion is to provide the sole limit on judicial remedies, that discretion must counsel restraint." *Id.* at 75 (Kennedy, J., concurring).

As these cases establish, courts must consider federalism concerns and exercise judicial restraint when imposing remedies even for found constitutional violations. *A fortiorari*, those same principles must apply when a federal court imposes remedial measures pursuant to a voluntary consent decree in the absence of an admitted or adjudicated violation.[12] The *Milliken-Jenkins* line of cases simply does not square with the Ninth Circuit's holding that entry into a consent decree waives federalism objections to whatever remedies a district court might impose.

The consequences of the Ninth Circuit's overbroad waiver doctrine in the context of consent decrees will be serious and widespread. As this Court knows well, consent decrees play a critical role in the efficient and appropriate resolution of civil rights and institutional reform litigation. *E.g., Local 93*, 478 U.S. at 523-24, n.13 (explaining the benefits of consent decrees

12. Because federalism concerns remain even when a violation of federal law occurs, it would not change the analysis if the Ninth Circuit had effectively read the consent decree to admit a violation of federal law. Yet even if the existence of a violation were relevant, none exists here and none can be inferred. To read into the consent decree in this case such an admission or finding where none exists would be inconsistent with this Court's rulings in *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975) and *United States v. Armour & Co.*, 402 U.S. 673 (1971), that consent decrees "should be construed basically as contracts without reference to the legislation" that the plaintiffs "originally sought to enforce but never proved applicable through litigation." *ITT Continental Baking Co.*, 420 U.S. at 236-37; *also Armour*, 402 U.S. at 681-82 (because a consent decree is a "compromise" between the competing purposes of the parties, "the decree itself cannot be said to have a purpose"). "[I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Local Number 93, International Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 522 (1986).

and recognizing that for the reasons specified, "consent decrees have become widely used as devices to facilitate settlement"). In ruling that state agencies entering into consent decrees waive their federalism objections to proposed district court remedies, the Ninth Circuit dramatically weakens this vital tool for dispute resolution. State and local agencies will be exceedingly reluctant to enter into consent decrees knowing that, by opting for settlement, they will be surrendering to a district court unlimited remedial authority over their budgets and operations. And, thus, in the absence of action by this Court, constructive solutions to civil rights and other institutional reform issues will too often give way to protracted, expensive, and divisive litigation. Such a result is not merely unfortunate; it contravenes the "expressed congressional preference for voluntary remedial action," *Id.* (noting that Title VII favors voluntary remedial action).

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that the Petition be granted.

Respectfully submitted,

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